

Order

Michigan Supreme Court
Lansing, Michigan

July 28, 2009

Marilyn Kelly,
Chief Justice

137768

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

KELLY SUE SYMONS, Personal Representative
of the Estate of DANIEL A. SYMONS,
Plaintiff-Appellant,

v

SC: 137768
COA: 269663
Calhoun CC: 04-000769-NH

DR. ROBERT J. PRODINGER, DALE
RUSSELL, P.A., and BATTLE CREEK
EMERGENCY ROOM PHYSICIANS, P.C.,
Defendants-Appellees,

and

BATTLE CREEK HEALTH SYSTEMS,
Defendant.

On order of the Court, the application for leave to appeal the November 13, 2008 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals, and we REINSTATE the Calhoun Circuit Court's order denying defendant Dr. Robert Prodinger's motion for judgment notwithstanding the verdict. The trial court instructed the jury that its decision as to defendant Dale Russell's negligence would also determine Dr. Prodinger's responsibility. Because Dr. Prodinger failed to object to that jury instruction, he cannot now disclaim vicarious liability for Russell's negligence. Although the plaintiff did not plead a cause of action based on vicarious liability against Dr. Prodinger in the complaint, the Court of Appeals dissent correctly noted that under MCR 2.118(C)(1), issues that are tried by express or implied consent of the parties, even though they are not raised in the pleadings, are treated as if they had been raised by the pleadings.



d0721

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 28, 2009

Corbin R. Davis

Clerk